

Before the
Administrative Hearing Commission
State of Missouri



WHISPERING OAKS RESIDENTIAL,
CARE FACILITY, LLC,

Petitioner,

vs.

DEPARTMENT OF
NATURAL RESOURCES,

Respondent.

No. 13-2141 CWC

DECISION

Whispering Oaks Residential Care Facility, LLC (“Whispering Oaks”) filed a complaint with this Commission asking this Commission to either 1) enter an order deactivating its water permit or 2) order the Department of Natural Resources (“the Department”) to issue a letter stating that its water permit is deactivated. We dismiss the appeal for lack of jurisdiction, because we lack statutory authority to grant Whispering Oaks the requested relief.

Procedure

Whispering Oaks filed its complaint on December 23, 2013. The Department filed its answer and a motion for decision on the pleadings on January 13, 2014. Whispering Oaks filed a response to the Department’s motion on January 17, 2014.

The Department attached two exhibits to its motion and asks us to rely on those exhibits. A decision on the pleadings, however, is based solely on the complaint and the answer. 1 CSR

15-3.446(4).¹ After examining the Department’s motion, we are convinced it is more properly considered a motion for involuntary dismissal under 1 CSR 15-436(1)(A) because the Department alleges we lack jurisdiction. We will presume that the statements of fact in the complaint are true solely for the purpose of deciding whether we have jurisdiction (Findings of Fact, ¶¶1-4).

The Department also argues that we should dismiss because there is an action pending in the St. Louis County Circuit Court for the same relief. It relies on the exhibits to its motion: a “first amended petition” and a “memorandum of law in support of intervening plaintiffs.” Both those documents purport to be from St. Louis County case no. 10SL-CC05162, *State ex rel. Koster, et al., v. Whispering Oaks Residential Care Facility LLC, et al.* Neither of the documents is certified. Section 490.130² requires that court documents be certified in order to be admissible. However, in this instance, Whispering Oaks admits that the documents are authentic. We deem the documents admissible evidence by stipulation.

Findings of Fact

1. Whispering Oaks had a ground water system with a permit issued by the Department.
2. At some time after January 10, 2010, the Department deactivated the permit.
3. On December 20, 2013, an officer of Whispering Oaks contacted the Department and sought confirmation that the permit had been deactivated. Sara Holterman, a Department employee, refused to issue a letter stating that the permit had been deactivated.
4. Whispering Oaks requests that the Department issue a letter confirming that the permit is deactivated until Whispering Oaks requests that the permit be reinstated.

¹ References to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

² RSMo 2000. Statutory references are to the 2012 Cumulative Supplement to the Missouri Revised Statutes unless otherwise noted.

5. Missouri Attorney General Chris Koster and the Department filed an action against Whispering Oaks and Naren Chaganti in the St. Louis County Circuit Court, case no. 10SL-CC05162, seeking an injunction and civil penalties.
6. In the first amended petition in case no. 10SL-CC05162, the Attorney General and the Department allege that Whispering Oaks owned a water treatment system in St. Louis County that distributes water to the Wildwood Nursing and Rehabilitation Center. The Attorney General and the Department allege therein that Whispering Oaks and Chaganti, “the sole managing member of Whispering Oaks,”³ violated the Missouri Safe Drinking Water Law by:
 - a. failing to maintain positive pressure in the water distribution system on January 8 and December 18, 2010, as well as on other unknown dates, in violation of 10 CSR 60-4.080(9) (counts I and V);
 - b. failing to employ a “chief operator” having a valid certificate to oversee the water distribution system from September 2008 to the present time in violation of 10 CSR 60-4.010(4)(A) (count II);
 - c. failing to have an emergency operations plan from September 2008 to the present time in violation of 10 CSR 60-12.010 (count III); and
 - d. failing to monitor for residual disinfectant concentrations on May 14, 2009, and other unknown dates in violation of 10 CSR 60-4.080(1) and 10 CSR 60-4.055(3)(E) (count IV).

Conclusions of Law

We have authority to hear appeals and issue recommended decisions on matters before the Safe Drinking Water Commission (SDWC) and the Clean Water Commission (CWC).

³ Resp. Ex. A at ¶5.

Section 621.250.1. Both commissions are organized and function under the Department umbrella. Section 640.010.3⁴ (CWC transferred to Department by Type II transfer); § 640.105⁵ (SDWC established within the Department).

But this Commission is a creature of statute and can exercise only those powers conferred by law, not expand them. *Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs.*, 809 S.W.2d 153, 156 (Mo. App. W.D. 1991). The SDWC's role is set out in §§640.102 through 640.140. We have authority to hear appeals over administrative penalties imposed by the Director of the Department under § 621.250 and § 640.131.3.⁶ The CWC's role is set out in Chapter 644 of the Missouri Revised Statutes. Under § 621.250 and § 644.051, we have authority to hear appeals from denials of permits or conditions in permits. Under § 621.250 and § 644.056,⁷ we have authority to hear appeals for violations of §§ 644.006 to 644.141. Under § 621.250 and § 644.061,⁸ we have authority to hear appeals from the denials of variances to permits issued by the CWC.

We have examined all of these statutes and none require the Department to issue the letter that Whispering Oaks requests or provide for an appeal to this Commission from the denial of such a request. Whispering Oaks cites no other authority. We conclude that we lack the statutory authority to grant the relief requested.

The Department also argues that we should dismiss Whispering Oaks' complaint because there is another action pending in this state, St. Louis County case no. 10SL-CC05162, on the same cause. The issues do not appear to us to be the same. We need not decide whether they are in any event, because we lack jurisdiction as discussed above.

⁴RSMo 2000.

⁵RSMo 2000.

⁶RSMo 2000.

⁷RSMo 2000.

⁸RSMo 2000.

Finally, the Department argues that Whispering Oaks is not an aggrieved party. Because we have concluded that we lack jurisdiction, we need not decide whether Whispering Oaks is aggrieved, or otherwise has standing.

Summary

We dismiss this case because we lack jurisdiction.

SO ORDERED January 24, 2014.

/s/ Karen A. Winn
KAREN A. WINN
Commissioner